Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-2024

ROBERT WARTH, *Individually and on behalf of all other persons similarly situated*, LYNN REICHERT, *Individually and on behalf of all other persons similarly situated*, VICTOR VINKEY, *Individually and on behalf of all other persons similarly situated*, KATHERINE HARRIS, *Individually and on behalf of all other persons similarly situated*, ANDELINO ORTIZ, *Individually and on behalf of all other persons similarly situated*, CLARA BROADNIX, *Individually and on behalf of all other persons similarly situated*, ANGELEA REYES, *Individually and on behalf of all other persons similarly situated*, ROSE SINKLER, *Individually and on behalf of all other persons similarly situated*, METRO-ACT OF ROCHESTER, INC., HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC., ROCHESTER HOME BUILDERS ASSOCIATION, INC.,

Appellants

v.

IRA SELDIN, *Chairman*, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, *as members of the Zoning Board of the Town of Penfield;* GEORGE SHAW, *Chairman*, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, *as members of the Planning Board of the Town of Penfield;* IRENE GOSSIN, *Supervisor*, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, *as members of the Town Board of the Town of Penfield*, and the TOWN OF PENFIELD, NEW YORK,

Appellees

AMICUS CURIAE BRIEF
REGIONAL HOUSING LEGAL SERVICES, INC.

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INTRODUCTORY STATEMENT

Regional Housing Legal Services, Inc., is a non-profit corporation organized for the purpose of promoting development of housing for low-income persons. This Amicus Curiae Brief is filed for the purpose of discussion of the issues of the instant case in regard to the development of housing for low-income persons.

ARGUMENT

We do not intend to discuss all the issues raised in the instant case. The issues are typical of those which would be encountered in any exclusionary-zoning lawsuit instituted by parties other than a developer who is contesting the limitations upon development imposed on his specific site. These issues involve consideration of the requirements generally referred to as "justiciability", including Article III which requires that the lawsuit be a "case or controversy", "injury in fact" required for standing, "concrete adverseness" required for standing and justiciability, and ripeness of the controversy for judicial resolution.

We want to concentrate solely on these issues as they relate to the rights of future residents of a municipality, who are presently inadequately housed, and who desire to live in suitable dwelling units in the municipality in question, but who are unable to do so because those dwelling units have been prohibited by the zoning and land-use practices of the municipality. In the instant case, this would include Petitioners Broadnax, Sinkler, Reyes and Ortiz. In regard to these Petitioners, the Court of Appeals appeared troubled by two issues: (1) do these potential residents suffer an "injury in fact" if the zoning laws apply directly to landowners rather than to them; and (2) even if they are injured themselves by the limitations placed upon landowners, if they are not complaining about the restrictions imposed upon a specific site, does the case lack the "concrete adverseness" that is necessary for the court to cope with the problem?

These two issues are inter-related and both involve considerations of standing and of justiciability. If the potential residents have standing to raise the issue in court, which Professor Scott has described as "access standing", then the court will still consider whether the issue thus presented is suitable for decision by the courts, which he describes as "decision standing". See Scott, "*Standing in the Supreme Court—A Functional Analysis*", 86 *Harv. L. Rev.* 645 (1973). For access standing, the future residents must be asserting injury to their rights. In the instant case, these would be constitutional and statutory rights. One would assume that if their constitutional rights are being violated, that there would be an appropriate forum and suitable remedy for rectifying the violation of these rights. Whether this type of lawsuit brought in the federal courts is an appropriate means by which to raise these issues is the fundamental question before this Court.

A. Future residents have standing to challenge exclusionary-zoning practices because they are injured in fact by these practices.

It is important to recognize that the requirement of "injury in fact", as elaborated upon in the *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970) cases, does not require that the plaintiffs be the immediate subjects of the legislation being challenged. Plaintiffs who are the subjects of legislation, who we will refer to herein as "base plaintiffs," that is, plaintiffs whose conduct is required, prohibited or permitted by the legislation, have standing if they have rights at stake in the conduct which is being regulated. They usually do, and so they usually have standing, though there could be many situations in which these potential plaintiffs are actually not disturbed by the legislation or even approve of the limitations placed upon their conduct and that of other persons who would qualify as subjects of the legislation. We will mention some examples below.

In addition to the base plaintiffs, there are also potential plaintiffs who, while not being the subject of the legislation, find that their constitutional rights are violated by the legislation by reason of the impact of the legislation upon the realization of these rights. We will refer to these persons as "impact plaintiffs". As Justice Frankfurter recognized, "it is not always true that only the person immediately affected can challenge the action." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154 (1951). The legislation may not apply to them directly and this will depend upon the context in which the legislation is framed, but the impact upon their rights may be substantial. In other words, there will be a "logical nexus" between the legislation and the deprivation of their constitutional rights. *Flost v. Cohen*, 392 U.S. 83 (1968).

The courts have traditionally found standing in comparable situations to the instant case in which the plaintiffs are impact plaintiffs rather than base plaintiffs. We want to mention several situations so that it is clear that the standing of impact plaintiffs usually raises no problems in situations where rights are violated, even though the legislation being challenged violates these rights by regulating the conduct of persons other than the impact plaintiffs:

(a) *Roe v. Wade*, 410 U.S. 113 (1973). The legislation regulates the conduct of persons who perform abortions, not of persons who desire abortions. In fact, the pregnant woman who participates in an abortion may not commit a crime at all. 410 U.S. at 151, n. 49. The Supreme Court found no difficulty in awarding standing to Jane Roe, even though the statute did not regulate her conduct. Moreover, in regard to ripeness, the Court only required that she have been pregnant and desired an abortion. It was not necessary for her to knock on doctors' doors and be refused an abortion or for her to establish that such doctors would be available if the anti-abortion statute was invalidated. Applying this reasoning to the situation of the future resi-

dent, it should be sufficient for standing purposes if the plaintiff desires to live in the municipality in question and if suitable dwelling units have not been built in that municipality because of illegal zoning practices. He need not establish that he went to a vacant lot and attempted to knock on a non-existent door to inquire if housing for him was available. He need not bring a developer with him to court to testify that the housing would be built if the legislation is invalidated. We may assume in this case, as we can in the abortion case, that once the restrictions are removed, the subjects of the legislation will act in the manner desired by the impact plaintiffs, even though they will not be legally required to do so. In other words, doctors may refuse to perform abortions. They are not legally required to perform them, especially if there is no medical necessity for the abortion. Developers may not build housing for poor people. All that the impact plaintiff desires is that the subjects of the legislation not be legally prohibited from pursuing a course of conduct which results in the realization of their rights.

(b) *Loving v. Va.*, 388 U.S. 1 (1967). This is a challenge to a miscegenation statute. Notice in this example how the legislature may control by the context of the legislation exactly who will be the subject of the legislation. If the miscegenation statute prohibits black persons from marrying white persons, and makes it a criminal offense for the black persons to marry but not for the white persons, the black suitor would be a base plaintiff and the potential white spouse would be an impact plaintiff. The situations could be reversed by imposing the restriction upon the white partners. If the statute applied to clerks in the marriage-license bureau and restricted them from issuing marriage licenses to a racially-mixed couple, the subject of the legislation would be the clerk. Not only may he have no interest in instituting litigation, but he really has no rights at stake in the litigation. The impact plaintiffs would include both the white and black marital candidates if this legislation had the clerk as its subject.

(c) *Truax v. Reich*, 239 U.S. 33 (1915). Standing was granted to an alien employee to challenge a state statute requiring employers to discharge all but a specified portion of alien employees. (If there existed a sufficient supply of non-alien laborers, the employer like the clerk in the previous example, would have no interest in instituting litigation).

(d) *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Publishers have standing to challenge legal action threatened against distributors. The Court indicated that "pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied." 372 U.S. at 636, n. 6. See also *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), in which standing was granted to the employer to challenge prosecution of his employees and *Sam Andrews Sons v. Mitchell*, 326 F. Supp. 35 (S.D. Calif. 1971), in which standing was granted to the employer of Mexicans to challenge a regulation prohibiting them from accepting employment where a labor dispute exists.

(e) *Adler v. Board of Education*, 342 U.S. 485 (1951). Parents of school children apparently given standing to challenge a state law concerning eligibility requirements for employment as a school teacher. See also *Rogers v. Paul*, 382 U.S. 198 (1965) in which pupils were granted standing to challenge the racially-discriminatory allocations of faculty, and *Lee v. Nyquist*, 318 F. Supp. 710 (W.D. New York 1970) involving a challenge by parents of school children to a law applying to state education officials and

members of school boards. Parents of school children were also granted standing in *Engel v. Vitale*, 374 U.S. 421 (1962) and *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 267, n. 30 (1963), in which the Court recognized that to deny the parent standing "might effectively foreclose judicial inquiry."

(f) *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), in which Justice Burton recognized the distinction we are urging upon the Court in the instant case:

> "It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did. We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them." 341 U.S. at 141.

(g) *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Standing granted to a private school to enjoin enforcement of a statute requiring parents to send their children to public schools.

(h) *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). A competitor is granted standing to intervene in another party's license application hearing. This decision has been cited for allowing standing to competitors in numerous situations. It has also been extended to non-competitor situations. See *Columbia Broadcasting System v. U.S.*, 316 U.S. 407 (1942), in which the Court indicates that "the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act" will not preclude the recognition of standing. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractural rights and business

relations . . ." 316 U.S. at 422. See also *Office of Communications of the United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. 1966) and cases cited therein, 359 F.2d at 1002, in which Chief Justice Burger, sitting on the Court of Appeals, extended the concept of standing as set forth in *Sanders* to members of the listening audience.

(i) *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974). Welfare recipients have standing to challenge state's refusal to provide to hospitals reimbursement for the cost of abortions. See also *Tucker v. Hardin*, 430 F.2d 737 (1st Cir. 1970).

(j) *Shannon v. HUD*, 436 F. 2d 809 (3rd Cir. 1970). Standing granted to persons living in the vicinity of an urban renewal project. If neighbors may be impact plaintiffs, which is generally accepted in zoning litigation, then there is no reason why potential residents should not also be given standing.

As the Court indicated in *Flost v. Cohen*, 392 U.S. 83 (1968) and elaborated upon in *U.S. v. Scrap*, 412 U.S. 669 (1973), the impact plaintiffs must show a "logical nexus" between the legislation being challenged and the violation of their rights. This is essentially a question of degree of remoteness to the situation. The mother of Jane Roe may lack standing even though she will be stuck with the task of raising the child if Jane Roe is denied her abortion. Similarly, the parents of the young man who wants to move to Penfield, who are inconvenienced by his inability to move from their household, would probably lack standing. But Jane Roe herself and the potential resident himself have standing to challenge the legislation which has an impact upon their lives, even though they are not the subject of the legislation.

Their standing is based not only on the impact of the legislation upon their rights, but because they assert fundamental interests (in the instant case, the right to housing

and the related rights of employment, travel and education) which can be recognized only if they are granted standing to assert these interests. It is sufficient for access standing that they possess these rights, that there is a "logical nexus" between these rights and the legislation being challenged, and that they have been "injured in fact" by the legislation, even though they are not the subjects of the legislation. There still remains, however, the question of decision standing.

B. Future residents may litigate the invalidity of zoning restrictions imposed upon the entire municipality and are not limited to challenging the restrictions as they apply to a specific site.

If a lawsuit is brought challenging exclusionary zoning by a base plaintiff, it is obvious that his cause of action will revolve around the restrictions as they apply to his specific site. Since the ordinance has a direct impact upon development on a particular parcel, the case will focus upon the relationship between the proposed development and the limitations imposed upon its fruition. The federal courts have heard many of these cases, including some in which impact plaintiffs (future residents) joined with base plaintiffs (the landowner or developer). See *Kennedy Park Homes v. Lackawanna*, 318 F. Supp. 669, *aff'd*, 436 F.2d 108 (2d Cir.), *cert. denied*, 401 U.S. 1010 (1970); *Dailey v. Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971); and *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974).

In some of the specific site cases, the controversy began as a challenge to restrictions upon a particular parcel but developed into a more generalized attack upon the zoning practices in general. See *Southern Alameda Spanish-Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970 and *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972). This poses, in essence, a question of appropriate relief,

rather than the problem of decision standing. The point is, and we will elaborate upon this below, that it does not necessarily follow from the fact that a lawsuit is instituted by a developer about a specific development that the challenge may not also be directed to the problem of zoning restrictions that invariably prohibit development in general.

This Court has already considered cases involving restrictions upon housing in general, which did not concern the validity of restrictions as they applied to a specific site: *James v. Valtierra*, 402 U.S. 137 (1971); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erikson*, 393 U.S. 385 (1969); and *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

Standing has been recognized by the federal courts in comparable situations involving access to housing. See *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967) in regard to the rights of tenants of public housing projects; *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) in regard to the rights of displacees of an urban renewal project; and the cases already discussed.

When the lawsuit is brought by an impact plaintiff rather than a base plaintiff, it frequently happens that the context of the lawsuit may differ from that in which it would be framed if the subject of the challenged act brought the case. The subject of the statute will be able to refer to a specific episode in which the statute was applied, or threatened to be applied, to the conduct in question. The impact plaintiff will frequently be unable to do so.

The woman seeking an abortion may knock on doctors' doors and be rebuffed, but this should not be essential to bringing her case since the challenged statute makes it a criminal offense for the doctors to respond to her plea. The individual seeking employment in the *Truax* situation may go from office to office and be rebuffed in her efforts to find a job. But this is not a precondition to bringing the lawsuit since she is permitted to assume that the employer will obey the statute and deny her employment. The person who desires to reside in Penfield, but is unable to do so because

of the lack of adequate housing there, may urge landowners to build such housing. However, so long as the zoning ordinance prohibits the landowners from doing so, urging upon them that they disregard the law or challenge its validity themselves should not be a precondition to the future resident instituting litigation himself.

"Concrete adverseness" in a lawsuit instituted by an impact plaintiff arises from the collision of the constitutional rights and the imposition upon other persons of restrictions upon their conduct which interferes with realization of these rights. The parties are certainly adverse; the issues are clearly drawn; and the cases are judicially manageable.

The complaint of the future resident does not relate to the development of a particular project that has been thwarted. The complaint of the woman desiring an abortion does not relate to a particular doctor refusing to perform the abortion. The complaint of the woman seeking employment does not relate to a particular job offer. In each of these situations, the challenge is brought to an entire system of regulation which denies the plaintiff his rights by imposing restrictions upon others which would require those third parties to violate the law in order to vindicate the plaintiff's rights. These third parties may be willing to do so. See *Griswold v. Conn.*, 381 U.S. 479 (1965). But it is not essential to the framing of a lawsuit challenging the system of denial of these rights that the impact plaintiff persuade a member of the class which comprises the subject of the legislation that they should violate the legislation in order to litigate the issue. For the base plaintiffs, who are free to so act, this is not an unreasonable requirement in some situations. See *Poe v. Ullman*, 367 U.S. 497 (1961). For the impact plaintiffs, it is always unreasonable because it allows their rights to be placed at the mercy of third parties who may not find it advantageous to act in their behalf.

It is important to note that there is not an exact paralleling of interests between the developers and the future

residents. Not only are there economic reasons which may make it difficult for developers to initiate the necessary lawsuits, but, in many instances, it may be more practical for developers to agree to restrictive practices rather than contest them. Consider, for example, the situation which arises when the municipality imposes excessive requirements upon a developer which will affect the ultimate price of the house which he sells. So long as the house can be sold at that ultimate price, the developer may conclude that it is easier to agree to the requirements and get the house built rather than institute litigation to challenge the legality of the requirements in order to cut costs for the future buyers of the homes. It is, obviously, the future buyers of the homes who will suffer, since the costs will be passed along to them.

It is also important to note that, in order to accomplish a change in the prevailing system of zoning practices, those persons whose constitutional rights are most seriously at stake must be accorded standing so that they can assert their constitutional rights and present their arguments to the courts. The future residents, unless they are accorded standing, will be denied the opportunity to contest the legality of actions of municipal officials which have excluded them. They have had no political impact upon these decisions because they are not residents of the municipality. Unless the courts agree to hear their claims, they will be denied the right to participate in all phases of the governmental decision-making process because it is inextricably connected with the residential access which they have been denied.

Supreme Court decisions have emphasized the importance of access to the democratic process where the issue to be decided has a direct and substantial bearing on an individual's interests. *Dunn v. Blumstein*, 405 U.S. 336 (1972); *Phoenix v. Kolodziezski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969). The excluded persons would be

residents if they had not been excluded. They should not be denied standing to challenge their exclusion on the basis that they are not residents.

Similarly, the claim of future residents does not become ripe only if they have applied for a building permit to build a project on a particular site and been denied the permit. They are not builders and they do not own a particular site. Their claim is ripe when they seek the housing and are unable to find it. To return to our analogy above of the pregnant woman, it is not essential that the pregnant woman be also a doctor who wants to perform an abortion on herself. Her claim is ripe when she needs an abortion; the future resident's claim is ripe when he needs housing.

The relationship between the housing which is desired and the illegal practices which prevent the construction of this housing should be considered only after a trial on the merits. There may be no such relationship. There may be other factors which have prevented construction of the housing. But this can be determined only after the parties to the controversy have presented all of their evidence. Since the future resident is basing his challenge upon constitutional grounds, he is arguing, of course, that his interests are included within the "zone of interests" of the constitutional provision upon which he is relying. Full consideration of whether or not he possesses such interests should be decided only after a full trial and argument. The allegation of such rights should be sufficient at this stage.

Similarly, there may be some question about whether or not the individual Petitioners really desire housing in Penfield and whether or not more determined efforts to find such housing would have proven successful in securing such housing. This issue should also wait until there is a full hearing on the merits and should not be decided upon a record that consists primarily of the pleadings.

To return to our analogy of the pregnant woman for the last time, her case may not be ripe if she is not really pregnant or if abortions are being regularly performed

despite the letter of the law. See, however, *Epperson v. Ark.*, 393 U.S. 97 (1968) in which general non-application of the law may still not preclude a challenge to it. The reason for denial of the rights is a matter of defense which should be considered only after a full hearing.

CONCLUSION

Neither Article III standards of case or controversy, basic principles of standing, nor the requirements of justiciability and ripeness, operate to prevent a potential resident from challenging the invalidity of his exclusion from a particular community. Such exclusion violates fundamental rights of satisfaction of housing needs, obtaining of employment opportunities, and attendance at integrated educational institutions. This exclusion prevents these persons from residing in integrated communities and denies their right to travel and their right to fair housing opportunities.

Procedural prerequisites should never be applied to deny substantive rights. Existence of these substantive rights implies the existence of all necessary and appropriate remedies. *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). Granting standing to future residents is in keeping with the finest traditions of our jurisprudence and the precedents of this Court. It will further aid in realization of our national goal of a "decent home and a suitable living environment" as expressed in congressional statutes which have been part of our national policy since 1937. The Housing Act of 1937, 42 U.S.C. §1401; Section 2 of the Housing Act of 1949, 42 U.S.C. Section 1441; Section 2 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701(t); Housing and Community Development Act of 1974, Public Law 93-383, Section 1, 101(C).

Respectfully submitted,

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